No. 09-1342

In The
Supreme Court Of The United States

JERI-ANN SHERRY, Warden,

Petitioner,

-vs-

WILLIAM D. JOHNSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

I. Should a petition for a writ of certiorari be granted, where the Sixth Circuit's decision rests on clearly established Supreme Court law and where there is no conflict among the Circuits on the need to show prejudice from a full closure of the court room?

PARTIES TO THE PROCEEDING

All parties to the proceedings are listed in the caption. The Petitioner is Jeri Ann Sherry, Warden of a Michigan correctional facility. The Respondent is William Johnson, an inmate.

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The Sixth Circuit Court of Appeals denied a petition for rehearing en banc. Apx 1a. The opinion of the Court of Appeals is published at 586 F3d 439 (6th Cir, 2009). Apx 2a. The Opinion and Order of the United States District Court denying the petition is unpublished. Apx 18a.

The Michigan Supreme Court denied leave in an unpublished order. Apx 41a. The decision of the Michigan Court of Appeals affirming Johnson's conviction is unpublished. Apx 42a.

JURISDICTION

Respondent accepts Petitioner's statement of jurisdiction. Jurisdiction is based on 28 USC 1254(1). See also 28 USC 2101(C).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Closure of the court room occurred at trial during the testimony of the three main witnesses against Respondent. The Sixth Amendment states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...

The Sixth Amendment also provides that

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

The statute involved is 28 USC 2254(d) which provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgement of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim
>
> > (1) resulted in a decision that was contrary to or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or.
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

Subsection (e) of the statute accords the presumption of correctness to State court factual determinations. That subsection reads in pertinent parts as follows:

> (1) ... a determination of a factual issue made by a State court shall be presumed to

be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

COUNTER STATEMENT OF FACTS

William Johnson was convicted by a jury of the second degree murder in the death of Carlos Davis, assault with intent to commit murder on Robert Richards, assault with intent to commit murder on James Mathis, assault with intent to commit murder on Larry Lewis, and possession of a firearm during the commission of a felony.

THE CRIME

The crimes occurred in the early morning hours of March 3, 2002, in front of the BHA Hall on Caniff Street in the city of Hamtramck. A melee broke out inside the BHA Hall on Caniff in the city of Hamtramck, Michigan. One person, Elvin Robinson, was stabbed. Someone other than Petitioner was charged in that murder. Before he was to testify at the preliminary examination of this other defendant, he was killed. Elvin Robinson was not a witness against the Respondent.

As people were streaming out of the hall to get away from the melee, shots were fired outside the Hall. In that incident which is the res of this case, Carlos Davis, was killed; Larry Lewis and James Mathis were shot but survived, and Robert Richards although he did not suffer any gunshot wounds was also a complainant on an assault with intent to commit murder charge. Richards testified against the petitioner at the preliminary examination identifying him as the shooter.

Two days after the party, Robert Richards called the police from Larry Lewis' hospital room (Trial, January 7, 2003 II-160) and gave a detailed clothing description of the person he claimed to have seen standing in the parking lot and shooting at his friends. The description was of a black male wearing a baseball hat, black jacket with a car logo on the back, blue jeans with blue timberlane shoes. Trial, January 7, 2003 II-243-245; 248-249. His description did not include height, weight, body build, or distinguishing features. It was only a clothing description. Trial, January 7, 2003 II-163. The police displayed a photo, People's Exhibit #38, to him which had been taken the night of the party. It was a group shot of the Respondent and approximately 5 of his female cousins and 3-4 male cousins. Trial, January 8, 2003 III-45). Mr. Richards identified the appellant in that picture as the shooter. Trial, January 7, 2003 II-248. Mr. Richards testified at the preliminary examination but

was killed shortly thereafter. His testimony was read to the jury at trial.

CLOSURE

On the first day of trial, the prosecution asked that the trial be closed during the testimony of certain witnesses. The defense counsel said that if that's what the court wants to do, he had no objection as long as the jurors did not see the public being excluded from the courtroom. The judge agreed to that procedure. Apx 54a-58a.

On the second day of trial, the prosecution alerted the judge that closure should begin for the first three witnesses of the day. The court excluded everyone from the court room except for the jury, the attorneys, the officer in charge and Mr. Johnson. Defense counsel stated that he had informed the defendant's family not to come to court until 11:00am and to stay outside of the court room when they arrived if the court was in session. Apx 59a-61a.

The court was closed for the testimony of three main prosecution witnesses: James Mathis, a complainant; Larry Lewis, a chair-swinging complainant; and Damon Ramsuer, a non-complainant eye witness.

The family members who attended on the first day and had expected to observe the complete trial of their relative but were excluded on the morning of the second day were Celestine Cunningham, maternal great aunt, 47 years old; Gwendolyn Brumfield, maternal aunt, 50 years old; Lakeesha Ricks, first cousin, 38 years old; Valerie Thomas, aunt, 47 years old; Linda Johnson, aunt 43 years old. Apx 62a-63a.

In a post-conviction motion for new trial, the defense raised the issues of the denial of the right to a public trial and also defense counsel's failure to object to the denial. Respondent requested hearings on both issues. The request was denied.

DIRECT REVIEW

The Michigan Court of Appeals in a per curiam opinion affirmed the convictions. Apx 42a. The Michigan Supreme Court denied leave to appeal stating that it was not persuaded that the questions presented should be reviewed by the Court. Apx 41a.

HABEAS REVIEW

Mr. Johnson filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. On February 12, 2008, the district court judge denied the petition. Apx 18a.

On November 13, 2009, the United States Court of Appeals for the Sixth Circuit vacated the decision of the district court and remanded the matter for a hearing on whether the closure was justified, whether trial counsel was constitutionally ineffective for failing to object, and whether the cause and prejudice components of Respondent's public trial claim can be satisfied. Apx 12a.

On January 28, 2010, the Court denied a motion for rehearing en banc. Apx 1a.

Other facts will be referred to in the body of the arguments and are incorporated into this Statement by reference

REASONS FOR DENYING THE WRIT

The petition for certiorari filed in this case should be denied because it does not meet the "compelling reasons" standard found in Supreme Court Rule (SCR) 10. That rule offers a non-exclusive list of reasons that would earn the adjective "compelling". In this case, the Petitioner contends that the compelling reasons are that there is a conflict in the Circuits on the issue the prejudice prong of the *Strickland*[1] test when analyzing trial counsel's failure to object to closure of the court and that the Sixth Circuit's decision did not rest on clearly established Supreme Court precedent. However as will be shown there is no conflict and the Sixth Circuit's decision rests on clearly established Supreme Court law.

A. There is clearly established Supreme Court precedent that where there has been full closure of the courtroom, prejudice is presumed. This presumption fulfills the prejudice requirement of the *Strickland* test where counsel failed to object to closure.

1. The Right To A Public Trial

> In all criminal prosecutions, the accused shall enjoy a speedy and public trial...

Am VI, US Const.

The principle that justice cannot survive behind walls of silence is reflected in the Anglo-American distrust for secret trials. *In Re Oliver*, 333 US 257, 268 (1948). More recently, Judge Damon Keith observed that "[d]emocracies die behind closed doors. *Detroit Free Press v Ashcroft*, 303 F3d 681, 683 (6th Cir, 2002).

The Sixth Amendment to the United States Constitution guarantees to the accused in every criminal proceeding the right to a public trial. The right was applied to the states via the 14th Amendment due process clause. *Duncan v Louisiana*, 391 US 145, 148 (1968). This right is for the protection of the accused. *Estes v State of Texas*, 381 US 532, 538 (1965). That this right belongs to the accused was reaffirmed in *Gannett Co, Inc. v DePasquale*, 443 US 368, 380 (1979).

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1 *Strickland v Washington*, 466 US 668 (1984).

One of the earliest opportunities for the Court to analyze the right to a public trial occurred in a Michigan case. In *In re Oliver, supra*, a man was secretly tried and sentenced for contempt of a one-man grand jury. The Court reviewed the historical underpinnings of the right, but could not find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country. Nor did it find any record of even one such secret criminal trial in England since the abolition of the Court of Star Chamber in 1641.

In tracing the origin of the right to a public trial in the common law, the *Oliver* Court stated

> This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial. In this country, the guarantee to an accused of the right to a public trial first appeared in a state constitution in 1776. Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, ... most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions. Today almost without exception every state by constitution, statute, or judicial decision, requires that all criminal trials be open to the public.

Id. 266-267.

In overturning the contempt conviction, the Court identified three important functions that this right serves. First, it is a safeguard against government persecution:

> Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

Id. at p 270. Second, public trials discourage perjury:

> In addition to ensuring that judge and prosecutor carry out their duties responsibly, a public trial encourages witnesses to come forward and discourages perjury.

Id. at p 270 fn 24. This further preserves the integrity of the judicial system in the eyes of the public. Third, it protects citizens from irresponsible jurors.

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions * * *"

Id. at p 270 fn 25.

The Court also expressed a special concern for the presence of the defendant's friends and relatives:

> And without exception all courts have held that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged.

Id. at pp 271-272.

2. The Waller Test

The right to public trial is not absolute but yields in certain rare incidents.

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Press-Enterprise Co. v Superior Court of California, 464 US 501, 510 (1984).

In *Waller v Georgia,* 467 US 39, 45 (1984), the Court held that instances where the right to a public trial would give way to other overriding interests would be rare and balancing the interests must be done with special care. It adopted the following four-part test:

> 1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;
>
> 2) the closure must be no broader than necessary to protect that interest;
>
> 3) the trial court must consider reasonable alternatives to closing the hearing; and
>
> 4) it must make findings adequate to support the closure.

This unanimous *Waller* decision extended the right to a public trial to pre-trial proceedings. Recently, this Court, in a per curiam opinion, acknowledged that the right extends to the voir dire. *Presley v Georgia,* 130 S Ct 721 (2010). A violation was found where the public was excluded from the announcement of a verdict in a bench trial. *United States v Canady,* 126 F3d 352, 364 (2nd Cir, 1997),

As indicated in *Oliver*, the Courts recognize a special concern where the defendant's family and friends are excluded. *Bell v Jarvis*, 198 F3d 432, 437-42 (4th Cir, 1999)(Violation found where all but family and friends of the complainant were excluded from court); *Guzman v Scully*, 80 F3d

772, 773-77 (2nd Cir, 1996)(Habeas relief granted where the court excluded 4 spectators two of whom, women, were either friends or relative of the defendant from the cross-examination of a prosecution witness); *Vidal v Williams*, 31 F3d 67, 69 (2nd Cir, 1994)(Writ granted where Defendant's parents were excluded from the testimony of one police officer, a writ was granted).

From these cases, it is evident, first, that the right to a public trial encompasses all proceedings associated with the trial of a case and second, even where there is an overriding or compelling need for closure, exclusion of defendant's friends or relations implicates Sixth Amendment concerns.

3. Application of Law to Facts

In applying the *Waller* test to the facts of this case, Respondent easily demonstrates that his right to a public trial was denied.

a. There was no overriding interest which justified the closure of the court.

Under the first Waller factor, the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced. In the instant case, closure was full[2] so the prosecution had the burden to show an overriding or compelling interest that would be prejudiced by a public trial. It also had to be specific. *Id* at 48[3].

In requesting closure, the prosecution acknowledged that he had never requested closure before. He pointed out that a witness had been murdered, and that the complainant from another incident occurring that evening but not involving defendant, had been murdered. He added that some witnesses were scared to come to court. But there was no offer of proof as to which witnesses were scared or if any witness had been threatened. There was similarly no proof that anyone in the

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2 Partial closure refers to the practice of allowing some members of the public to remain in the courtroom, while full closure means the exclusion of all members of the public.

3 The trial court's findings of fact must also be specific to enable appellate review. *Waller*, 467 US at 45. No specific findings were made by the trial court. Trial, January 6, 2003 I 135-139, Apx 54a-58a and Trial, January 7, 2003, II 5-6 Apx 59a-61a..

defendant's family had ever threatened the witnesses or in fact was involved in the death of Robert Richards, let alone Elvin Robinson.[4] The prosecutor even conceded that the support for his motion was thin. Apx 54a-58a. The prosecution failed to make the required specific showing.

The Court was closed during the testimony of Damon Ramsuer, James Mathis, and Larry Lewis, the most important witnesses in the case.[5] The latter two were complainants. Damon Ramsuer was not a complainant albeit he was an eyewitness. Although in a statement signed by Mr. Ramsuer, he identified the defendant as the shooter, he did not identify him at trial and he denied ever making any identification. He also testified at trial that there was no reason for him not to say who killed his friend. (Trial Transcript Vol. II-97). Larry Lewis testified at the preliminary examination, but he never identified anyone in any statement, at the examination or at trial. James Mathis was also a complainant. He never identified anyone as the shooter. No facts were offered to show that these witnesses were threatened by the jailed defendant or by his relatives or by his friends. Nor did the witnesses, themselves express fear for their safety. Thus there was no compelling reason for any closure let alone a full closure with its infringement on the defendant's right to a public trial. Compare to *Woods v Kuhlmann*, 977 F2d 74, 76 (2nd Cir, 1992), where an overriding interest justifying closure was based on the fact that the witness was the only eyewitness, and that defendant's family had threatened the witness in the past.

b. The concerns of the prosecution could be met by less than full closure.

Under the second prong in which the closure must be no broader than necessary to protect

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4 The dissent judge in the Sixth Circuit mistakenly stated that Elvin Robinson was killed before testifying at Respondent's preliminary examination. Apx 14a. Mr. Robinson was killed before testifying at the examination in the case in which he was a complainant. He was neither a witness nor a complainant in the case at bar.

5 The other prosecution witnesses were either expert witnesses, officers who responded to the scene and civilians who observed the initial chair-swinging incident inside the club. A prosecution witness offered after the defense rested, a woman, testified to observing the shooting and to a description of the shooter(s). The Court was not closed for her testimony.

the interest, the scale weighs again in favor of Respondent. Since there was no compelling interest, closure should not have been allowed. Even if this Court found that there was a compelling interest there was still no evidence which would support the closure of the court to the defendant's family members three middle-aged female aunts and one 38-year old female first cousin. Statement of the Case p. 5; Apx 62a-63a. There was no evidence that defendant's middle-aged female relatives were a danger to the safety of the witnesses, or that they knew who they were before testifying, nor that they even knew where the witnesses lived. Under *In Re Oliver, supra*, the Supreme Court expressed a special concern for the defendant's family and friends and in fact has never applied the *Waller* test to a state court's exclusion of family members. Both the Second and the Eleventh Circuit have also applied a more rigorous review where family was excluded. *Yung v Walker*, 341 F3d 104, 110 (2nd Cir, 2003); *Vidal v Williams, supra*; *Judd v Haley*, 250 F3d 1308, 1315 (11th Cir, 2001).

In the case at bar, Respondent's family should have been allowed to stay. The state court's decision on the second prong of the *Waller* test was clearly unreasonable and contrary to supreme court precedent.

c. The trial court did not consider reasonable alternatives to full closure.

Under the third *Waller* factor, the trial court failed to consider reasonable alternatives to closing the trial, such as allowing Mr. Johnson's family to remain. The Michigan Court of Appeals held that the defendant did not propose an alternative way to protect the witnesses safety and so this factor weighed against him. Apx 44a. This was contrary to the holding in *Waller*. It is up to the court to fashion less restrictive means so it can protect the defendant's right to a public trial. The defendant has no burden under the *Waller* test. The *Presley* Court also found that trial courts must consider alternatives to closure "even when they are not offered by the parties." It noted that this "is clear not only from this Court's precedents but also from the premise that '[t]he process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system.'" 130 S Ct at 724 quoting from *Press-Enterprise Co. v Superior Court*, 464 US 501, 505 (1984).

d. The Court did not make findings adequate to support the closure.

The fourth *Waller* factor requires the court to make findings adequate to support the closure. The Court cautioned that the findings may not be broad and general. *Waller* at 45. The findings must be specific. *Waller* at 48. Here, the trial court knew it was on dangerous grounds. Apx 54a. This was also reflected in the fact that its findings are almost non existent and certainly not adequate to support the closure. It never knew which witnesses claimed to be frightened and never knew if any witnesses had been threatened. It never knew what family members were being excluded. No attempt was even made by the court to discover these facts.

The appellate Court's decision was contrary to the requirements of *Waller* which was specific in requiring findings adequate to support closure. As an example of the kind of record that should be made before witnesses may testify in secret, the Second Circuit in a case where the court was closed to family during an undercover officer's testimony, pointed out the following:

> Applying the fourth *Waller* prong, the district court reasoned that, before Yung's family could be excluded from the courtroom, the state court was required to make findings with respect to the likelihood of an encounter between the undercover officer and the family members in question or the family members' inclination to harm the undercover officer.

Yung, supra at 111. The *Yung* Court stated that the proper test was not a sufficiency of the evidence test but rather whether the presumptively correct findings were adequate to support closure. But in the instant case, this test is irrelevant because there are no findings to presume to be correct. So on these last two prongs of the *Waller* test, the state court, again unreasonably applied *Waller* and its decision was contrary to the decision in *Waller*. Apx 43a-44a.

The Michigan Court of Appeals relied on two decisions that were not on point with the case at bar. These two cases were *People v Kline*, 197 Mich App 165, 170-171, 494 NW2d 756 (1992) and *Nieto v Sullivan*, 879 F2d 743, 753 (10th Cir, 1989). (Apx 44a). Both of them were partial closure cases in that some people remained in the court room after it was closed. In *Kline*, a couple of people waiting for another case were excepted from closure and in *Nieto* only defendant's relatives were excluded. The Michigan appellate court's reliance on *Nieto* and *Kline* was misplaced and shows

that its analysis of this issue was clearly unreasonable under *Waller, Duncan,* and *Oliver*. It was also contrary to the decisions in those cases. In fact under the *Oliver* case, relatives may not be excluded.

The fact that the State court analyzed the facts of the case as a partial closure rather than a full closure rebuts the presumption of correctness that would otherwise be accorded to its factual determinations under 28 USC 2254(e)(1).

6. The Presumption of Prejudice and the Strickland Test.

Where there has been full closure, that is that the public has been completely excluded from the court room, a specific showing of prejudice is not required. *Waller*, 467 US at 49-50. Once the denial of the right is established, reversal is automatic because this is a structural defect in the trial mechanism itself. *Arizona v Fulminante*, 499 US 279, 310 (1991). In *Neder v United States*, 527 US 1, 7 (1999), the Court again held that the denial of the right to a public trial is a structural error and noted that "errors of this type are so intrinsically harmful as to require automatic reversal." The reason for this rule is that the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance. The violation of the right is not subject to a harmless error review. *Waller, supra* p. 49 n9; *United States v Gonzalez-Lopez*, 548 US 140, 150 fn 4 (2006). If the defendant was required to show prejudice, it would make this right one in name only. *Carson v Fischer*, 421 F3d 83, 95 (2nd Cir, 2005)(Rejecting harmless error analysis); *United States v Canady*, 126 F3d 352, 364 (2nd Cir, 1997)(if the denial of the right to a public trial was not a structural defect and thus subject to a harmless error analysis, the violation would almost always be held to be harmless).

While Respondent acknowledges that the test for ineffective assistance of counsel usually requires a showing of prejudice, Supreme Court cases hold that instances where it is impossible to measure it, such a showing is not required. This was shown above in the right to a public trial. The requirement is waived where there has been an actual or constructive denial of the right to counsel. *Strickland v Washington*, 466 US 668, 692 (1984). The Court also waives the requirement where counsel has an actual conflicting interest. *Cuyler v Sullivan*, 446 US 335 (1980). It is also waived in assistance of counsel cases where the prosecution is directly responsible or it would have been easy

for the prosecution to prevent it. *Purvis v Crosby*, 451 F3d 734, 740 (11th Cir. 2006) quoting *United States v Cronic*, 466 US 648, 104 S Ct 2039, 2067 (1984). Thus there is precedent to waive the requirement in cases of ineffective assistance of counsel.

There is no requirement that "clearly established" Supreme Court law for 28 USC 2254 purposes is only that which is explicitly stated in the form of a rule. It includes not only bright-line rules but the legal principles and standards flowing from precedent. *Taylor v Withrow*, 288 F3d 846, 852 (6th Cir, 2002). Clearly established law refers to the holdings as opposed to the dicta of the Supreme Court's decisions as of the time of the relevant state court decision. *Williams v Taylor*, 529 US 362, 412 (2000). The law is the "governing legal principle or principles set forth by the Supreme Court..." *Lockyer v Andrade*, 538 US 63, 71-72 (2003). Moreover the *Williams* Court stated that under 28 USC 2254 it would be unreasonable for a state court to refuse to extend a rule to a new context where it applies. *Williams v Taylor*, supra at 407.

Because the right to a public trial is of such pre-eminent value in our criminal justice system, even where neither party asserts the right, it is error to exclude the public. *Presley, supra* at 724-725. See also *Press-Enterprise Co. v Superior Court, supra* at 503-504, 513, albeit the violation in that latter case was brought as a First Amendment challenge. The former case involved a Sixth Amendment violation. This right is so paramount, yet the prejudicial effect of the violation is not easy to measure. Courts also excuse a showing of prejudice where the right has been violated because the benefits of the right are intangible. To require a defendant to do on the second prong of *Strickland* that which it has already found impossible to prove is objectively unreasonable.

The Michigan Court of Appeals did not discuss this issue. It merely concluded that it was not outcome determinative. Apx 48a.

Petitioner relies on two cases to argue that the Sixth Circuit cannot excuse a showing of prejudice. These case are *Davis v Secretary for the Department of Corrections*, 411 US 233 (1973) and *Francis v Henderson*, 425 US 536 (1976). However neither *Davis* nor *Henderson* concerned errors which at the time of their decisions were considered structural defects in the framework of the

trial. They both involved the absence of African-Americans from the grand jury which returned the indictments. It was not until the decision in *Rose v Mitchell,* 443 US 545 (1979), that this Court recognized that a harmless error analysis should not apply to discrimination in the selection of grand jurors, three years after the decision in *Henderson* and six years after the decision in *Davis*. And in both cases, there were specific procedural rules requiring objections to any errors in the institution of the proceeding to be made before trial. FRCrP 12(b); La.Code Crim.Proc.Ann. Art. 535(B)(3).

In the instant case, the Sixth Circuit's opinion rests on clearly established Supreme Court law.

B. There is no conflict in the circuits on the issue of whether full closure requires a showing of prejudice under *Strickland* where trial counsel failed to object to the closure.

Petitioner contends that there is a conflict in the Circuits as to whether prejudice must be shown. It points to *Owens v United States*, 483 F3d 48 (1st Cir. 2007) along with the instant case which found that an unjustified full closure of the court was a structural defect in the trial mechanism excusing a showing of prejudice on the second *Strickland* prong where trial counsel failed to object versus *Purvis v Crosby*, 451 F3d 734 (11th Cir. 2006), finding that a defendant must make a showing that he was prejudiced at trial by counsel's failure to object to closure. However, since *Purvis* was a partial closure case and since the Eleventh Circuit found that a partial closure is a defect merely in the proceedings not in the framework of the trial, there is no conflict. While the *Purvis* Court does discuss structural defects and the prejudice requirement, this exegesis was not necessary for its decision. Before that discussion, the Eleventh Circuit had decided the case based on a partial closure:

> If counsel had objected in a timely fashion and persuaded the trial judge not to partially close the courtroom, there is no reason to believe that would have changed the victim's testimony in a way that would have created a reasonable doubt in the jury's mind. (Emphasis added).

Id. at 738-739.

The Petitioner has not shown a compelling reason for the grant of the petition. Nor has it shown that the Sixth Circuit Court of Appeals improperly applied the standard found at 28 USC

2254(d). The petition should be denied.

CONCLUSION

The decision of the Michigan Court of Appeals was based on an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States in *Waller v Georgia* and *Strickland v Washington*, and 28 USC 2254 (d). It is contrary to clearly established federal law as determined by the Supreme Court of the United States in the above cases. 28 USC 2254 (d)(1). It also resulted in decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. 28 USC 2254 (d)(2). This Court should deny the petition for certiorari because the Sixth Circuit Court of Appeals correctly applied the standards delineated in 28 USC 2254(d) and because there is no conflict among the Circuits.

The petition for a writ of certiorari should be denied and the decision of the Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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